paramedic ambulances to volunteer to perform certain activities, such as "throw[ing] a ladder" to rescue a person and save a life, he also testified that "they wouldn't be disciplined for not" doing so (126), even "if their [*sic*, should be "they're"] given an assignment and they didn't take action." (145).

REASONS FOR DENYING THE PETITION

There is no compelling reason for review in this Court.

A. Since its passage over six years ago, there have been only five decisions in which the statute has even been mentioned and only three in which it has been applied.

Including this case, plaintiffs are aware of only five decisions in which section 203(y) has been mentioned since its passage over six years ago, in December, 1999. It has been applied in only three cases including this case.

In *Lockwood v. Prince George's County*, No. 99-2487, 2000 U.S. App. LEXIS 15302 (4th Cir. June 29, 2000), and *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), the Fourth Circuit and Fifth Circuit respectively held that section 203(y) was not to be applied retroactively and, therefore, did not apply to the cases before them.

In *Weaver v. City and County of San Francisco*, No. CV-03-01589-SI, 2004 U.S. Dist. LEXIS 3421 (N.D. Cal. Feb. 27, 2004), the district court held that the plaintiffs there did have the "responsibility to engage in fire suppression" within the meaning of section 203(y). The *Weaver* court distinguished the district court decision in

Cleveland on its facts. 2004 U.S. Dist. LEXIS 3421 at *21. On December 16, 2005, the Ninth Circuit reversed and remanded *Weaver* for reconsideration in light of its decision in *Cleveland*. No. 04-15597, 2005 U.S. App. LEXIS 28239 (9th Cir. December 16, 2005).

Finally, in *Chavez v. The City of Katy, Texas*, No. H-04-2573 (S.D. Tex. July 14, 2005), the district court held that defendant employer had not met its burden of showing that the plaintiff – who was trained as both a firefighter and emergency medical technician but was "dispatched to fire scenes to treat injured firefighters or civilians," slip op. at 9-10, and who was advised by a supervisor that "fire suppression was not what Plaintiff was authorized to do, that he was strictly EMS," slip op. at 10 – did not have the "legal authority or responsibility to engage in fire suppression" under section 203(y).

Since the Ninth Circuit's decision in this case in August, 2005, so far as plaintiffs can determine, other than by the Ninth Circuit itself in reversing and remanding *Weaver*, the Ninth Circuit's decision in this case has not been cited by any court for any proposition.

B. The Ninth Circuit's decision is the only circuit court authority; there are no conflicting decisions of any court.

Not only is there no circuit court authority conflicting with the decision of the Ninth Circuit here, there is no conflicting authority of any kind. No other court of appeals has reviewed the application of section 203(y). Only two other district courts have applied the statute. *Chavez* is entirely consistent with the decisions of the court of appeals and the district court in this case, holding that

notwithstanding firefighter training, the plaintiff there was not responsible for firefighting because it was not his job to do firefighting. *Weaver* explicitly distinguished *Cleveland* on the facts, and, in any event, has now been reversed.

The City tries to create a conflict by citing decisions that arose before the passage of section 203(y) and were decided under then-applicable DOL regulations. Petition pp. 20-21. However, the only question presented for review here (and the only question presented by the City to the court of appeals) was whether the district court properly interpreted and applied section 203(y). Earlier cases decided under the regulations that governed before the passage of section 203(y) in 1999, and that therefore do not discuss the substance of section 203(y), obviously are not, and cannot logically be, in conflict with the decision of the court of appeals in any relevant sense.[3]

C. The question presented does not require the urgent attention of this Court.

The City's attempt to create a doomsday scenario requiring the urgent attention of this Court is belied by the facts. There is no evidence for the City's contention that "the nation's fire suppression agencies" have had

[3] Two different DOL regulations conceivably applied, and the district court in this case ruled that plaintiffs were not exempt under either of them. However, this finding of the trial court was not appealed by the City, which limited its appeal to the interpretation of section 203(y). The DOL regulations defining "employees in fire protection" were replaced by section 203(y), and any difficulties courts of appeals may have had in deciphering and applying the earlier regulations have no bearing on the application of the statute and do not create a conflict on the meaning of section 203(y).

difficulty applying and functioning under the law.[4] In over six years since its passage, only three cases have been decided on the substance of section 203(y). One is this case. One (*Chavez*) is exactly consistent with this case. And the third (*Weaver*) has been reversed and remanded by the Ninth Circuit in light of its decision in this case. The City has identified only one other recently-filed case and one DOL recently-issued opinion letter on the issue. Nothing about either of those matters supports a need for review by this Court.[5]

Indeed, the City has mischaracterized the recent DOL opinion letter. Petition p. 19. The facts presented to DOL included that the cross-trained firefighter/paramedics about whom inquiry was made would respond to all fire and other emergency calls and perform fire or medical services as needed. If a majority of their time was spent on medical calls, this was simply because those calls outnumbered fire calls. But because their job was to fight fires when there are fires, DOL concluded that these employees qualify under section 203(y). This opinion letter is thus consistent with the decision of the court of appeals in this case. It is precisely the factual situation presented in the opinion letter that section 203(y) is addressed to. Employees who are "responsible" for fighting fires when they occur are exempt under the firefighting exemption even

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[4] Governmental employers may choose to use the overtime threshold of section 207(k) for their firefighters, or not, as they see fit. Therefore, the question of who is within the meaning of section 203(y) does not even arise in jurisdictions that choose not to use section 207(k).

[5] Plaintiffs are aware of another case in which the employer is asserting a defense based on 29 U.S.C. § 203(y), *Lawrence v. City of Philadelphia*, No. 03-CV-4009 (E.D. Pa.). No decisions have been rendered in the case.

though they may spend the majority of time performing other emergency work due to the infrequency of fire calls. Plaintiffs, however, are different. They are not "responsible" for fighting fires when there are fires, they are not expected to do so, and there is no real chance that they will. They thus are not properly exempt under the firefighting exemption.

The City's naked claim that the court of appeals' decision "immediately and adversely affects the ability of local governments nationwide to provide emergency services to the public" is unsupported hyperbole. Petition, pp. 16-19. How jurisdictions allocate and deploy emergency services resources is subject to many variables which have nothing to do with section 203(y). Additionally, this statute has nothing to do with how municipalities deploy or allocate emergency services resources, but rather how and when emergency services resources must be paid overtime. All the decision here holds is that, based on the plain words of the statute, the partial overtime exemption for "firefighters" applies only to employees who, in addition to firefighter training, have the "responsibility to engage in fire suppression" and does not apply to those who do not. If the City would like the law to be otherwise, it should seek to have Congress amend the law.

D. The court of appeals decided the case consistently with the relevant decisions of this Court.

1. The decision is consistent with established FLSA jurisprudence.

Determining who is required to be paid overtime and who may be exempted under any of the many exemptions contained in the FLSA is and has always been a fact-specific

inquiry. The rules for making this determination are well settled: The FLSA is construed liberally in favor of employees. *See Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 297 (1985); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). FLSA exemptions are construed narrowly against employers and in favor of employees. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). An employer seeking to take advantage of an FLSA exemption must prove that the employees meet each element of the exemption, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974), and fit "plainly and unmistakably" within both the terms and the spirit of the claimed exemption. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The court of appeals followed these rules. 420 F.3d at 988.

Whether employees fit within an FLSA exemption has always been determined by what employees actually do on their jobs rather than from job titles or job descriptions or what they theoretically might do but do not. "[A]s we have repeatedly said, the application of the Act depends upon the character of the employees' activities." *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132-133 (1945). In determining whether employees are exempt from the FLSA overtime rules, the question is "whether their particular activities excluded them from the overtime benefits of the FLSA." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). That job titles and level of training are not dispositive when determining exemptions is repeatedly expressed in DOL regulations. *See, e.g.*, 29 C.F.R. § 541.2 (2005) (job titles insufficient); 29 C.F.R. § 541.303(a) (2005) (training or certification not sufficient, must be "employed and engaged" in teaching); 29 C.F.R.

§ 541.304(a)(1) (2005) (training as a lawyer or doctor not sufficient, must be "actually engaged in the practice thereof").

2. The decision is consistent with precedents regarding interpretation of statutes generally.

The court of appeals properly followed the relevant decisions of this Court on statutory interpretation. Interpretation of the meaning of statutes always starts with the words of the law itself. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). There is no special definition of the word "responsibility" in section 203(y). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The source for the common meaning of words is the dictionary. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997); *TRW Inc. v. Andrews*, 534 U.S. 19, 32 (2001); *Arthur Anderson, LLP v. United States*, 125 S.Ct. 2129, 2136 (2005). Using the ordinary meaning of the word "responsibility," the court of appeals determined that, based on the facts, the district court properly concluded that the City did not meet its burden of showing that plaintiffs have the "responsibility to engage in fire suppression."

Since section 203(y) can be comfortably read using the ordinary and common meaning of the words used, there is no reason and no basis to go beyond the regular "plain language" definition of the word "responsibility" in the

statute, which is not ambiguous in any pertinent way.[6] *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). The court of appeals properly held that reference to legislative history would be inappropriate and imprudent. 420 F.3d at 990 n.11, citing *HUD v. Rucker*, 535 U.S. 125, 132 (2002) and *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).

The City does not explicitly argue that the statutory language is ambiguous. It also does not purport to rely on any cases of this Court setting forth the rules of statutory interpretation. Instead, the City claims that snippets of legislative history show a "specific purpose" to "prevent decisions" like this one, and that therefore the circuit court's failure to consider legislative history "nullified" the statute. Petition, p. 15. But, "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances, . . . when a contrary legislative intent is clearly expressed.'" *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991). The scant legislative history offered by the City does not provide anything close to a clear basis to think that Congress meant to depart from the ordinary and common meaning of the word "responsibility" – or the longstanding FLSA jurisprudence about determining whether employees are exempt – let alone a specific Congressional purpose to "prevent decisions" like this one. On the House floor, Congressman Clay noted that the bill

[6] It does not appear that any court has found the meaning of the word "responsibility" to be ambiguous in any pertinent way. In *Pizza v. Wolf Creek Ski Development*, 711 P.2d 671, 676 (Colo. 1985), the court said that the word "responsibility" was "common and readily understood [and] [t]he probable legislative intent in using such a word may be determined by resorting to a standard dictionary."

"provides that *where firefighters are cross-trained and* ***are expected to perform both firefighting and emergency medical services,*** they will be treated as firefighters for the purpose of overtime." 145 Cong. Rec. H11500 (Nov. 4, 1999) (emphasis added). This comment echoes exactly the written statement of Hon. William F. Goodling, Chairman, House Committee on Education and the Workforce, Markup of H.R. 1693 (Nov. 3, 1999), and is precisely consistent with the Ninth Circuit's decision in this case. Similarly, Congressman Boehner stated that section 203(y) was designed to "ensure that *firefighters* who are cross-trained" would be covered by the section 207(k) exemption even if they did not spend "*all*" their time performing direct fire fighting activities. 145 Cong. Rec. H11500 (Nov. 4, 1999) (emphasis added).[7] About as close as the City can come to a bit of legislative history that supports its argument is the comment by Representative Ehrlich to the effect that section 203(y) was intended to modify the "20% rule" contained in the earlier DOL regulations. Petition, p. 14. However, nothing in Congressman Ehrlich's comments implies that 203(y) was meant to apply to employees who do not fight fires at all and are neither expected nor likely to do so. Indeed, he stated clearly that it was intended to address firefighters who "in addition to firefighting" may "also" be expected to respond to other emergency calls. 145 Cong. Rec. H11500 (Nov. 4, 1999).

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[7] The City also cites the statement of Congressman Weldon, 145 Cong. Rec. E2343 (Nov. 10, 1999). But the statement indicates that Congressman Weldon was possibly confused about the effect of the statute and believed that it was intended to increase overtime compensation to firefighters rather than restrict it.

Even if the statutory history was ambiguous, "ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language." *Ardestani*, 502 U.S. 129, 137 (1991). This is not one of the "rare and exceptional circumstances" where the plain words of the statute may be ignored. The court was "bound to take Congress at its word," *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998), and "simply interpret the statute as written." *Arthur Anderson, LLP v. United States*, 125 S.Ct. 2129, 2135 (2005).

3. The court's interpretation does not render part of the statute meaningless.

The City's argument that the court of appeals' interpretation of "responsibility" conflicts with section 203(y)(2) is wrong.[8] The statute contains two subdivisions setting forth independent requirements for exemption as an "employee in fire protection activities." The first subdivision, section 203(y)(1), requires that the employee be trained in fire suppression, and have the legal authority and responsibility to engage in fire suppression and be employed by a governmental fire department. The second subdivision, 203(y)(2), provides that an employee who satisfies subdivision (1), must *also* be engaged in either the prevention, control or extinguishment of fires, or response to emergency situations where life, property, or the environment is at risk. In other words, the statute provides that if your job is to fight fires when there are fires, time spent doing other emergency services work

[8] The City also made this argument to the court of appeals, but the court apparently did not deem it significant enough to address.

when there are not fires does not preclude you from being an "employee in fire protection activities."[9]

Section 203(y) does not do what the City is trying to make it do: Make all employees trained as firefighters exempt regardless of their assignment or how they spend their working time. Indeed, it is the City's interpretation that would read part of the statute out of it, namely the "responsibility to engage in fire suppression" requirement.

The statute means what it plainly says, and the City's efforts to make it say something else were properly rejected by both lower courts. The decision of the court of appeals affirming the district court's decision after trial that, based on the facts, plaintiffs were not "responsible" to engage in fire suppression was clearly correct.

CONCLUSION

For the foregoing reasons, the City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] This is also clearly reflected in the comments of legislators as noted above.